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No. 04-911

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SUPREME COURT, U.S.

In the Supreme Court of the United States

KEYSTONE LAND & DEVELOPMENT COMPANY,
Petitioner,

v.

XEROX CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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I. THE CERTIFICATION PROCESS AS APPLIED IN THIS CASE IS IN CONFLICT WITH FEDERAL LAW REQUIRING A TRIAL TO RESOLVE DISPUTED FACTUAL ISSUES IN SUMMARY JUDGMENT PROCEEDINGS.

In deciding a motion for summary judgment the federal judge, after viewing all the evidence in the light most favorable to the nonmoving party, must determine whether there are any genuine issues of material fact. *Meade v. Cedarapids, Inc.*, 164 F.3d 1218, 1221 (9th Cir. 1999). It is fundamental that in federal court if a rational trier of fact might possibly resolve the issue in favor of the nonmoving party, summary judgment must be denied. *T.W. Elec. Service v. Pacific Elec. Contractors*, 809 F.2d 626, 630-31 (9th Cir. 1987). Only if the moving party satisfies its rather heavy burden of establishing that the undisputed facts of the case entitles it to judgment as a matter of law can summary judgment be appropriately granted. Accordingly, Xerox as the moving party in this summary judgment proceeding had the burden of proving that it was entitled to judgment as a matter of law based on the undisputed facts of the case.

Therefore, in order for Keystone to survive Xerox's motion for summary judgment in this case, Keystone need only present evidence from which a jury might possibly return a verdict in its favor. Importantly, the Court of Appeals has already determined that "there are genuinely disputed material facts that would permit, though not compel, a rational jury to conclude that a contract to negotiate existed and that, if such a contract is recognized in this type of case, Xerox breached it." Certification Order, App. E at 32a.

This Court in *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958) long ago emphasized that:

> The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence – if not the command – of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury."

Byrd at 537.

In order to promote "a strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts," this Court in *Byrd* required the factual question of whether the plaintiff qualified as a "statutory employee" for workmens' compensation purposes to be decided by a federal jury, even though the law of South Carolina clearly required the judge to resolve this issue. *Id.* at 538. Although *Byrd* was a common law case for personal injuries caused by negligence, this Court held that the injured party had a federally protected right to a jury trial because "the jury on the entire record . . . might reasonably reach an opposite conclusion from the Court of Appeals as to the ultimate fact whether the respondent was a statutory employer." *Id.* at 532.

The certification process formulated by the Court of Appeals and implemented by the Washington Supreme Court in this case obliterates the "judge-jury relationship" recognized by this Court in *Byrd* as being an essential

component of the federal system of justice. First, contrary to the fundamental requirements for summary judgment to be granted under Rule 56 of the Federal Rules of Civil Procedure, the Washington Supreme Court impermissibly shifted the burden of affirmatively proving the existence of a contract to Keystone. It concluded that "[t]he exchange of letters with which we are presented does not constitute a contract to negotiate." Supreme Court Opinion, App. C at 17a. The Court of Appeals, by simply adopting the state court's "explanation" of Washington law, similarly concluded that "Keystone's evidence does not suffice to establish a contract to negotiate." Court of Appeals Opinion, App. B at 7a. Both opinions completely ignore the federal standards universally applicable to the consideration of summary judgment motions. Keystone, as the nonmoving party in a summary judgment proceeding, is not required to prove all the elements of its case in order to defeat the motion.[1]

Second, the Washington Supreme Court decided the ultimate and dispositive issue in this case based exclusively on a mere "summary of facts" provided by the Court of Appeals. Court of Appeals Opinion, App. E at 25a.[2] Although

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[1] Citing Rule 56(e), Xerox argues that: "In response to Xerox's motion for summary judgment dismissing the negotiation claim (and on Keystone's own motion), Keystone had the burden of coming forward with facts sufficient to constitute a contract to negotiate under Washington law." Respondent's Brief in Opposition at 15. However, under Rule 56(e) Keystone, as the adverse party, is only required to "set forth specific facts showing that there is a genuine issue for trial."

[2] The parties were never requested by the Court of Appeals to stipulate as to the facts of the case or otherwise comment on the appropriateness of the certification order. Typically, a comprehensive record, or relevant portions thereof, is presented for

Keystone generally agrees with the background facts as summarized by the Court of Appeals, Keystone emphatically emphasizes that they do not constitute all of the facts necessary for a jury to consider in deciding whether Keystone can prove whether a contract to negotiate was formed in this case.

Third, the Washington Supreme Court's answer to the certified question indicated for the first time that, in order for a contract to negotiate to be enforceable in Washington, the parties must "exchange promises to conform to a specific course of conduct during negotiations, such as negotiating in good faith, exclusively with each other, or for a specific period of time . . . [There must be] an agreement as to how the parties were required to proceed." Supreme Court Opinion, App. C at 17a-18a. Without the benefit of the Washington Supreme Court's guidance as to the essential elements for an agreement to negotiate, Keystone was unable to identify the facts in this case which are relevant to the determination of whether agreement to negotiate was formed.[3]

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the state court's consideration for the purpose of providing a contextual background for answering the submitted question of local law. For example, in *Barnes v. Atlantic & Pacific Life Ins. Co.*, 514 F.2d 704 (5th Cir. 1975), a case cited by Xerox, the Fifth Circuit forwarded the entire record to the Supreme Court of Alabama, including "copies of the briefs of the parties, the letter directive, counsels' memoranda on certification, proposed certification with differences and all of the papers." *Id.* at 709.

[3] As this Court specifically recognized in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1985):

> As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the

If Keystone had the opportunity to present its case to a judge or jury based on the requirements of a contract to negotiate established by the Washington Supreme Court, it would contend that the following facts proved that the parties had reached agreement as to a course to follow to guide their negotiation of a contract: (i) the comprehensiveness of the terms of sale expressed in the letters forming the contract resulted in the need for relatively little further negotiation or direction; (ii) the parties had expressly agreed, as the first step in the negotiation process, to "proceed immediately to draft . . . for review and execution" a formal Purchase and Sale Agreement; and (iii) although inexplicably not even mentioned by the Supreme Court, Keystone and Xerox had specifically agreed that the Purchase and Sale Agreement was contemplated to be executed "with[in] thirty (30) days from the execution of this letter of intent." Although these considerations do not necessarily compel a determination that a contract to negotiate had been formed, a rational trier of fact could easily arrive at such a conclusion.

> outcome of the suit under the governing law will properly preclude the entry of summary judgment . . . This materiality inquiry is independent of and separate from the question of the incorporation of the evidentiary standard into the summary judgment determination. That is, while the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs.

II. XEROX HAS FAILED TO PROVIDE ANY SUPPORT FOR CERTIFICATION TO BE USED TO ALLOW A STATE COURT TO RESOLVE FACTUAL DISPUTES AND APPLY THE LAW TO THE FACTS IN DISPOSITION OF THE CASE.

The exclusive purpose of certification is to provide definitive assistance to the federal judiciary in ascertaining the content of state law applicable in cases governed by the "Erie doctrine." Although Xerox contends that it was both "usual and appropriate" for the Court of Appeals to delegate its jurisdictional responsibility for case disposition to a state court by allowing it to decide this case on its merits, the only support Xerox can provide for this assertion is a few isolated cases decided in the Fifth Circuit over thirty years ago. These cases, which represent the extent of the results of Xerox's presumably extensive research, did not even consider the fundamental question of the scope or limitations of the certification process. They clearly did not sanction the state court to assume the federal court's responsibility to resolve disputed factual questions or to apply its determination of new law to the particular facts of the case.

However, one case cited by Xerox, *Barnes v. Atlantic & Pacific Life Ins. Co.*, 514 F.2d 704 (5th Cir. 1975), merits further consideration. As correctly noted by Xerox, the Fifth Circuit in *Barnes* certified "five fact-specific" questions to the Alabama Supreme Court relating to the interpretation of an insurance policy under Alabama statutory and common law. These questions were to be evaluated in light of the "entire record" in the case, including a factual statement stipulated by the parties. Although the Alabama court answered certain of the questions, due to conflicting evidence on the record as to whether "the insurer's delay in issuing the policy in this case

was within the bounds of reasonableness," it refused to resolve any factual disputes relating to the proper interpretation of the insurance contract. *Barnes v. Atlantic & Pacific Life Ins. Co.*, 325 So.2d 143, 150-51 (1975).

Based on the state court's response to the certified questions, the Fifth Circuit agreed that the insured's estoppel argument "is a fact question which was not within the province of the Alabama Court. It is not for our determination either since this is the role of the Trial Court." *Barnes v. Atlantic & Pacific Life Ins. Co.*, 530 F.2d 98, 100 (5th Cir. 1976). Accordingly, the Fifth Circuit held "as a matter of federal law . . . even on the agreed statement of facts there is a 'genuine issue of material fact' so that summary judgment for the Insurer on this issue was improper." *Id.* at 101. In remanding the case to the district court for trial the Fifth Circuit also observed that the Supreme Court of Alabama "did not, of course, undertake to determine questions of Federal Rules, F.R. Civ. P. 56(c), or federal principles on summary judgment." *Id.*

Similar to whether the insurer in *Barnes* acted reasonably in delaying its issuance of the insurance policy, the determination of whether Xerox and Keystone had agreed "to conform to a specific course of conduct during negotiations" requires an intensively fact-based inquiry which must be completed by the jury at trial. As the Fifth Circuit ultimately determined in *Barnes*, certification cannot be used as a vehicle to alter the fundamental relationship existing between a federal judge and jury. The existence of factual disputes, and the need to present the facts relevant to the question of whether a contract to negotiate was actually formed in this case, precludes a state court from independently making its own determination as to how a case finally should be decided. Xerox has failed to provide any case which supports such a

dramatic departure from established federal practices relating to the certification process.

III. ON MULTIPLE OCCASIONS KEYSTONE RAISED ITS OBJECTIONS TO THE CERTIFICATION ORDER TO BOTH THE WASHINGTON STATE SUPREME COURT AND COURT OF APPEALS.

Contrary to the usual procedures applicable to the certification of questions of local law, neither Keystone nor Xerox participated in the Court of Appeals' formulation of the questions included in the certification order. Consequently, no opportunity existed for either Keystone or Xerox to register their concerns or objections at the inception of the certification process. Further, because the certification order was interlocutory in nature, Keystone had no realistic basis for petitioning this Court to issue a writ of certiorari to review the initial validity of the order.

. . .

Prior to the issuance of the Washington Supreme Court's opinion in answer to the certified question, Keystone filed a motion with the Court of Appeals requesting it to clarify its certification order. In this motion Keystone specifically registered with the Court of Appeals its objections and concerns relating to the Washington Supreme Court being requested to dispose of this case by deciding the ultimate question of whether a contract to negotiate actually existed "under the circumstances presented in this case." In response, the Court of Appeals issued its clarification order which, while acknowledging the "expressions of concern by members of the [supreme] court to deciding the ultimate issue in this specific case," reinforced that it indeed wanted "the certified question [to be] dispositive of the case." Clarification Order, App. D at 21a-22a.

In addition, again prior to the Washington Supreme Court's issuance of its answering opinion, Keystone petitioned the Washington Supreme Court for permission to file additional briefs specifically for the purpose of presenting Keystone's jurisdictional concerns. The Washington Supreme Court, concluding that "supplemental briefing is unnecessary," denied Keystone's motion. Supreme Court Opinion, App. C at 10a, fn. 1. After the Court of Appeals issued its opinion, Keystone also filed a Motion for Panel Rehearing with the Ninth Circuit. This Motion was denied by the Court of Appeals. App. A at 1a.

Because Keystone earnestly on multiple occasions presented its objections to the certification order to both the Washington Supreme Court and Court of Appeals, the basis of Xerox's contention that Keystone failed to timely raise its concerns about the appropriateness of the certification order is misguided and erroneous. Based on the unusual procedural history of this case, Keystone is convinced that it diligently and consistently expressed its objections to the certification order to both the Court of Appeals and Supreme Court.

IV. CONCLUSION.

Accordingly, Keystone requests that its petition for a writ of certiorari be granted. Further, Keystone requests this Court to order the summary reversal of the Court of Appeals' decision.

Respectfully submitted,

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